IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 4TH SEPTEMBER 2007 / 13TH BHADRA 1929

CRL.A.No. 1153 of 2007()

SC.313/2005 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA

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APPELLANT/ACCUSED:

BALAKRISHNAN, S/O.APPACHETTY
C.NO. 4395
CENTRAL JAIL
KANNUR

BY ADV. V.MANOJ KUMAR[STATE BRIEF]

RESPONDENT/STATE:

STATE OF KERALA
REP: BY EXCISE INSPECTOR
SULTHAN BATHERY
C.R.NO.74/2003, EXCISE RANGE
SULTHAN BATHERY

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO.1153 OF 2007

Dated this the 4th day of September, 2007

JUDGMENT

The sole accused in S.C. No.313 of 2005 on the file of the Additional Sessions Court (Ad hoc) II, Kalpetta is the appellant. He faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution allegation against the appellant - accused was that on 6.9.2003 at about 5 p.m., while PWs.1 and 2 were on patrol duty in Cheerai Village, the appellant was found in possession of 5 litres of illicit arrack in MO.1 can, intended for sale . To prove the case against the accused, the prosecution examined PWs.1 to 5 and produced Exts.P1 to P6 as well as MO.1 can. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied the allegations levelled against him and stated that he was innocent and that he was arrested from his house. However, relying on the evidence adduced by the prosecution, the trial court found the accused guilty under Section 55(a) of

the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1, 00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. He was also given the benefit of Section 428 Cr.P.C. The above conviction and sentence are challenged in this appeal.

3. This appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions: (i) the trial court ought not to have believed the evidence of PWs.1, 2 and 5 who were excise officials as PWs.3 and 4, the independent witnesses turned hostile to the prosecution, (ii) even accepting the evidence adduced by the prosecution, the trial court committed serious error in finding the appellant guilty under Section 55(a) of the Abkari Act as the prosecution failed to prove that the contraband articles found in the possession of the appellant were in connection with export, import, transport or transit. To substantiate this contention, learned counsel for the appellant placed reliance on the decisions of this Court reported in

Surendran v. Excise Inspector,2004(1) K.L.T. 404 and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631.** Lastly, counsel contents that the trial court ought to have taken into account the fact that the prosecution had not explained the delay which occurred in producing the sample and the contraband articles before the court.

5. The trial court mainly relied on the evidence of PWs.1 and 2 to find the appellant guilty of the offence alleged against him. PW.1 was the Preventive Officer who detected the offence. He deposed before the court below that on 6.9.2003 while he was on patrol duty along with PW.2 and other excise officials, he reached the place of occurrence on receiving information regarding sale of arrack and found the accused carrying a plastic can. PW.1 further stated that on examining the plastic can, it was found to contain 5 litres of arrack. This witness further stated that he took 200 ml. of arrack in a bottle as sample, sealed and labelled the bottle as well as MO.1 plastic can and thereafter seized the contraband articles in the presence of witnesses as per Ext.P1 seizure mahazar. He also stated that he arrested the accused after preparing Ext.P2 arrest memo and produced the accused and the seized articles before the Excise Officer on the next day. PW.2 was the Preventive Officer who had accompanied PW.1 on the date of the incident. He supported the evidence of PW.1.

The trial court also accepted the evidence of PW.5 who was the Excise Inspector of Sulthan Bathery Excise Range. This witness stated that he conducted investigation of the case and filed the final charge. He also stated that the sample collected from the plastic can was sent for chemical analysis. Ext.P6 is the chemical analysis report which shows that the sample contained 53.28 percent of ethyl alcohol by volume.

6. The criticism raised against the evidence of these witnesses is that PWs.3 and 4, the two independent witnesses, turned hostile to the prosecution and hence, the trial court ought not to have accepted the evidence of the official witnesses to find the appellant guilty of the charge. There is no legal bar in accepting the evidence of the official witnesses or the investigating officers, if their evidence is free from doubt or infirmity. The trial court was fully justified in believing the evidence of PWs.1, 2 and 5. If so, the finding entered by the trial court that the appellant - accused was found in possession of 5 litres of arrack in MO.1 can on the date of the incident requires no interference.

7. The next question is whether the trial court was justified in finding the appellant guilty under Section 55(a) of the Abkari Act in the light of the decisions reported in **Surendran v. Excise Inspector, 2004(1)**

K.L.T. 404 and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631.** The prosecution allegation was that the appellant was found in possession of 5 litres of arrack on the date of the incident for the purpose of sale. But, the prosecution had not adduced any evidence with regard to sale of arrack. The prosecution had also not proved that the arrack found in the possession of the appellant was in connection with export, import, transport or transit. As per the principles laid down in the decisions referred to above, to attract an offence under Section 55(a) of the Abkari Act, the prosecution must allege and prove that possession of the contraband article was in connection with export, import, transport or transit. In the above circumstances, the finding of the trial court that the accused committed offence punishable under Section 55(a) of the Abkari Act is not sustainable. However, the learned Public Prosecutor submits that the prosecution had succeeded in proving that the appellant was found in possession of 5 litres of arrack and hence the appellant committed offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act. Admittedly, as per Ext.P1 seizure mahazar PW.1 seized MO.1 can from the appellant. Sample was collected from MO.1 can for chemical analysis and Ext.P6 chemical analysis report shows that the sample analysed was arrack. Possession of arrack in any form is punishable under Section 8(2) of the Abkari Act. Hence, the finding of the trial court that

the appellant committed offence punishable under Section 55(a) of the Abkari Act and the conviction entered thereunder are set aside and the appellant is found guilty under Section 8(1) read with Section 8(2) of the Abkari Act.

8. With regard to the contention that there was no evidence to prove that the contraband articles and the sample were produced before the court in time, PW.5 in answer to a specific question put to him regarding this aspect stated that the contraband articles and the sample were produced before the court on 11.9.2003. Though this witness had stated that he was not aware as to who had produced the same before the court, that by itself is not a reason to doubt the evidence of PWs.1 and 2. That apart, though the case set up by the appellant was that he was arrested from his house, no evidence was adduced to establish this fact. There is no evidence to show that the delay in producing the contraband articles and the sample before the court has caused prejudice to the appellant and hence, it will not vitiate the prosecution case at all.

9. On an overall appreciation of the entire evidence, this Court is of the view that the finding entered by the trial court that the appellant was found in possession of 5 litres of arrack in contravention to the provisions

of the Abkari Act is justifiable. The appellant is, therefore, convicted under Section 8(1) read with Section 8(2) of the Abkari Act. Possession of arrack by itself is an offence liable to be punished with imprisonment for a term which may extend to ten years and with fine which shall not be less that rupees one lakh. Considering the fact that the incident happened in the year 2003 and investigation was completed only after two years, this Court is of the view that a sentence of rigorous imprisonment for one year and a fine of Rs.1,00,000/- will meet the ends of justice. Accordingly, the appellant is sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of three months. The appellant is also entitled to the benefit under Section 428 Cr.P.C.

With the above modification in the conviction and sentence, the Crl. Appeal is dismissed.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A. NO.1153/2007

JUDGMENT

4TH SEPTEMBER, 2007